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No. 643

In the Supreme Court of the United States

OCTOBER TERM, 1950

OSWALD POHL, ET AL, PETITIONERS,

vs.

DEAN ACHESON, SECRETARY OF STATE, ET AL, RESPONDENTS.

REPLY BRIEF FOR PETITIONERS

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APRIL 19, 1951.

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Petitioners contend that the serious questions presented in their Petition required a more candid treatment than they were afforded in the brief of the respondents. A reply is deemed essential to a proper presentation to this Honorable Court of the grave issues here involved and upon which the lives of petitioners depend.

Reply to Respondents' Statement

Respondents admit that all petitioners were sentenced to death by United States Military tribunals and commissions sitting in occupied Germany (Br. 2, 21). Respondents admit (Br. 2, 21) that petitioners, Pohl, Naumann, Blobel, Braune and Ohlendorf were tried under United States Ordinance No. 7 and that Schallermair and Schmidt were tried under directives of the American European Command. Respondents boldly state that as petitioners are German

Nationals, each is "an enemy alien." We dispute this statement and contend that petitioners are friendly Nationals of the newly created Federal Republic for Germany, which has been recognized by the United States.

Respondents assert that Ohlendorf, Naumann, Blobel and Braune were SS officers of a unit formed specifically to liquidate civilians in conquered territories. This is not so. We state in answer that the Einsatzgruppen was a military force of Germany assigned for military activities in Russia. Respondents admit (Br. 3) that Ohlendorf was a Major General in command of a military unit, that Naumann was a Brigadier General commanding another unit, that Blobel was a Colonel and that Braune was a Lieutenant Colonel. This is a clear admission that such petitioners were not in policy making positions and had no authority to change the orders under which they operated as soldiers of Germany. While it is true that many Communists were killed by German units during the course of their military operations in Russia, we are completely at a loss to understand how petitioners can now be lawfully executed for such killings. If it is the contention of respondents that because 90,000 people were killed and in this group were Russian Jews, Gypsies, women and children, the killings should be construed as "mass murder", the implications of such a contention would be appalling. It must always be borne in mind that petitioners Ohlendorf, Naumann, Blobel and Braune *were engaged in military activities* against Russian Communists *in Russia.* It is now well known that the Communists during the periods described in the indictment perpetrated many massacres against the Germans and their Allies. We summarize a few. The Communists perpetrated mass deportations and executions all over the Eastern battle front. It is known that over 60,000 persons were murdered or removed from Estonia, that 60,000 more disap-

peared from Latvia and that some 700,000 persons were deported or massacred in Lithuania. The Polish Government has estimated that from Poland 1,600,000 persons disappeared into Russia. It is known that 400,000 of these deportees died in Russia. It is known that out of 144,000 Polish children deported into Russia, 77,834 are unaccounted for. Hundreds of thousands of German troops captured by the Russians are unaccounted for. Russia has executed thousands *of SS troops.* It is known that some 9000 Polish officers, the very cream of the Polish Army, were executed by the Russians, as respondents put it "without investigation and without trial." It is known that of the 300,000 Rumanian prisoners of war who fought against the Russians and were captured by them, that no fewer than 164,000 are accounted for. Millions died in Communist concentration camps, including countless Germans. These figures illustrate the type of oriental enemy confronting the Germans and their Allies in the East and demonstrate that an "all out" and "no quarter war" was under way there. In these circumstances, how can death sentences be executed against minor officers who carried out orders, including execution orders, in such a maelstrom of blood letting. If respondents would have us believe that, because during the period of its military operations against the Communists in Russia the Einsatzgruppen killed 90,000 people, such killings are "illegal," we suggest to respondents the fact that *total war* necessarily means not only killings on a vast scale but killings of innocent men, women and children who are in no way responsible for either the instigation of the war or its conduct.

In the course of the war the United States and Great Britain found it necessary to destroy by air attacks German cities. Of course, in these raids many men, women and children were killed. Thus, in two raids on Dresden on

the night of February 13, 1945, 25,000 persons were killed and 30,000 more injured. Similar casualties occurred in every major city in Germany and in many of Germany's towns and villages. As great as this destruction of humanity and property was, and as great as the killings of the Einsatzgruppen of Communists in Russia were, as regards the extent of such killings nothing equals the killings by two atomic bombs of noncombatants living in the cities of Hiroshima and Nagasaki. Records now show that the dropping of two atomic bombs on these cities caused no fewer than 280,000 casualties. Insofar as physical suffering is concerned, it can probably be said that the agonies inflicted by atomic bombing are too excruciating for description.

Yet, there can be no question under International Law and the Laws of War applicable here that where such killings are necessary in the defense of one's country they cannot be considered as "illegal" or as respondents put it, "evil." We will discuss the "illegality" of such orders later in this brief in the light of utterances of the *political* experts and officers of the United States and its Allies.

Insofar as the conviction of Pohl is concerned, respondents state (Br. 3, 4) that he "had charge of the administration of all concentration camps,"[1] and from this argue that he could be found "responsible for the destruction of the Warsaw ghetto, including the deportation or exterminations of more than 56,000 Jews." Respondents state that Pohl "personally selected prisoners for medical experiment" and that "his organization played a major role in the rounding up of Jews in occupied areas." In reply

[1] Pohl had no such function. This function was in the Office of State Security headed by Kaltenbrunner and Nebe. Pohl was not filling concentration camps, he was guiding persons out of these camps and into the German industry. No crime was charged or proven concerning Pohl's actual functioning.

to these assertions, we refer this Court to our discussion of the Pohl conviction (Petition pp. 15-21) which clearly demonstrates the errors of such statements. Not one of these operations can be charged to Pohl, originated from Pohl or his department and Pohl had no official connection with them. A word should be said concerning the statement that Pohl was responsible for the Warsaw ghetto destruction and the fate of 56,000 Jews. In his letter of July 28, 1942 to the State Secretary of the Reich Ministry of Transportation and to Police Chief Globocznik, the Chief of Staff of Himmler, *General Karl Wolff,* ordered these actions because of an uprising in which thousands of German troops were killed. Pohl had no competency with reference to them. The roundings up of Jews in the East and their deportations to concentration camps, such as Auschwitz, were the resppnsibility of the "Chief of Staff of the SS", General Karl Wolff and of Eichmann, not Pohl.

This Court might be interested in knowing that since Pohl's conviction General Karl Wolff has now admitted that he personally "from 1936 to February, 1943" was "Chief of the Office of the Personal Staff of Himmler" and that Pohl was never Chief of Staff of the SS. Further, General Wolff has testified under oath that Pohl was responsible only for the direction and allocation of labor and that he never issued an order for *a* single killing or the commission of *any* inhuman acts. This Court might be interested in knowing that the tribunal which tried Pohl found *not one single order of Pohl concerning the execution of any person.*

As we have pointed out in our Petition, it seems to be the theory of the American tribunal which tried Pohl and of respondents that Pohl is guilty if he held "a major role" in the general organization known as the SS. From this they hold him responsible for all deaths which occurred

in concentration camps in Germany. This is error. We submit that guilt must be individual, that war crimes trials are not games, and that by substituting Pohl for Wolff, that Pohl cannot be lawfully convicted and sentenced to death for "crimes" of Wolff, Himmler's Chief of Staff.

Respondents merely assert (Br. 4) insofar as Schallermair and Schmidt are concerned that they were convicted of *causing* the deaths of concentration camp prisoners. No fact set forth in our Petition pertaining to the cases of these two petitioners is disputed by respondents. Therefore, in answer to this generalized and unsupported statement of respondents, we refer the Court to our discussion of these two cases (Petition pp. 32-43, 66-70).

Respondents refer to (Br. 4, 5) various petitions filed as original applications for Habeas Corpus with this Court. Basically in those cases this Court held by an equally divided Court that the Court did not have *original* jurisdiction in these matters. Such cases have no bearing on the present applications as they were filed in the District Court in accordance with the rule announced by the court below in *Flick* v. *Johnson*, 174 F. (2d) 983, that Germans in Germany serving sentences of United States Military Commissions may sue for a Writ of Habeas Corpus in the United States District Court for the District of Columbia. The important questions involved in the Nurnberg and Dachau trials conducted by United States Military Commissions have never been decided by this Court. They should be settled by this Court. In such circumstances, Certiorari is clearly warranted.

Reply to Respondents' Argument

1. We dispute the statement of respondents that it is *undisputed* that each of petitioners is "• • • an enemy alien." This statement is in error and shows that the respondents have misunderstood our arguments. Respond-

ents argue, on the erroneous premise that petitioners are enemy aliens, that *Johnson* v. *Eisentrager*, 339 U. S. 763 is controlling and required the dismissal of the Petitions below. Respondents admit in their brief (p. 16) that no contention was made in the *Eisentrager* case that the petitioners there involved were *not* enemy aliens. They admit that that matter was not decided by this Court in that case (Br. 16). On the basis of this admission we submit that the *Eisentrager* case is not controlling here as the end of the war is alleged. Further, we have shown that the United States has *recognized* the *new* Federal Republic for Western Germany, which means that petitioners are friendly aliens, not enemy aliens.

2. Respondents next argue, as this Court *in 1947* and *in 1948* in the *Fleming*,[2] *Woods*[3] *and Ludecke*[4] cases indicated that a state of war *then* existed between the United States and Germany, and because this fact was "'assumed" in the *Eisentrager* case, that a state of war exists *today* between the United States and Germany. As a subsidiary argument respondents state that the termination of a state of war between the United States and Germany is a political act. Respondents then argue that the political branch of the government has not brought the war with Germany to an end. The latest utterances cited by respondents as examples of the actions of the political department of the United States are a joint statement made by the Foreign Ministers of France, the United Kingdom and the United States on September 19, 1950 (Br. 12) and a quotation from the Occupation Statute of April, 1949 (Br. 11). We submit that respondents' arguments miss the point. We will restate our position for clarity. When the Allies successfully concluded their military campaigns in Ger-

[2] 331 U. S. 111.
[3] 333 U. S. 138.
[4] 335 U. S. 160.

many, Germany surrendered *unconditionally*. This meant that there no longer was any legal government of Germany operating in Germany. To fill this legal void the Control Council made up of the Zone Commanders of the United States, Great Britain, France and Russia was created as the legislative and judicial authority for Germany. General Eisenhower, the United States Zone Commander, issued a military edict rendering void all legislation of Hitler's Third Reich. The Allied Control Council proceeded to control Germany. In order to function, *unanimous* action of the Council by *all four* of the participating powers was required. Russia, during the period of the Berlin airlift, refused to participate in the Council's proceedings. In other words, Russia walked out of and *ended* the Council. As a result, Germany was divided into Western and Eastern Zones. The Eastern Zone is governed by Russia. In order to combat the spread of communism over Europe, the United States, Great Britain and France entered into agreements with the three Western Zones of Germany. Under these agreements legislative power and judicial authority were restored to the *new* Federal Republic for Germany. While certain powers are reserved to the Allies under the Occupation Statute of April 9, 1949, it is clear from the announcement of the Foreign Ministers of France, the United Kingdom and the United States of September 19, 1950 that a "new relationship" has been established between these three Governments and the new Federal Republic of Germany and as soon as action could be taken in the three allied countries, the state of war would be terminated for purposes of domestic legislation of the Allies (Br. 12). While it might be argued that on September 19, 1950 a technical state of war might have existed,[4a] one of the

[4a] This statement is consistent with peace and the end of the war with *Western* Germany and the *existence* of a state of war with *Eastern* Germany *because the Western Powers have not recognized Eastern Germany.*

actions which definitely terminated that "state of war" was the *recognition* by the three allied Governments of the new Federal Republic of Germany. The renewal of diplomatic relations between the new Germany and the Allies followed, ending all probability of a resumption of hostilities by the Allies.

The present forces in Germany are being retained there and new forces are being sent there to effectuate the military commitments of the United States under the North Atlantic Pact. The presence of such troops in Germany is no evidence that respondents intend to resume hostilities against Western Germany.

Legally, the situation is simply this. Hitler's Third Reich, the government of Germany with which the Allies were at war, came to an end on unconditional surrender. A state of war continued to exist until a new government was formed for Germany and was recognized by the Allies. This government came into being in April of 1949. It is known as the Federal Republic of Germany. It was permitted to establish a Constitution which the Allies have improved. As the new Federal Government has functioned satisfactorily, it has been decided politically that the United States, Great Britain and France "recognize" the new German Government and reestablish with that German Government diplomatic relations. So, in March, 1951, the Occupation Statute *was amended* and the United States, Great Britain and France *reestablished* diplomatic relations with the Federal Republic for Germany.

Of course, we know that legally enemy aliens cannot serve in the armies of the United States, Great Britain and France. Yet, after the creation and recognition of the new German Government, over 30,000 Germans have been inducted into the armies of the West and are now being trained in the British Zone for the defense of Europe. To

show France's approach to the problem, the French High Commissioner on March 27 pardoned twenty German war criminals sentenced by occupation courts for war crimes and offenses endangering the security of the Allies.

The actions we have described in our Petition on behalf of the United States are political actions taken by the political branch of this government. No recent utterance of the political branch of the government is set forth in respondents' brief to show that that branch considers that a state of war exists today between the United States and Germany. No formal Act of Congress or proclamation of the President is now needed, because the formal actions taken by the President and the political department of the government in establishing a new government for Germany, in recognizing that government, and in exchanging diplomatic representatives with that government have brought into play the principles announced by this Court in *United States* v. *Pink*, 315 U. S. 203 and *United States* v. *Belmont*, 301 U. S. 324. Even if such a construction were placed by respondent Acheson upon the legal situation now existing between the United States and Germany (which construction is *not* shown in respondents' brief to have been so taken), that would not be conclusive upon this Court and this Court *has the right to determine the legal effect of existing agreements*. *Factor* v. *Laubenheimer*, 290 U. S. 276, 295.

We have not overlooked the distinction between a cessation of hostilities and the termination of a state of war, as respondents assert (Br. 13). On the contrary, we state that the political branch of the government, in conjunction with the governments of the United Kingdom and France, has established a new Federal Republic for Germany, has recognized that new republic and has restored normal relations with it. These political actions end the technical

state of war which existed on the unconditional surrender of Hitler's Third Reich.

3. Respondents state (Br. 14) our contention that the *Eisentrager* rule is inapplicable is "frivolous on its face." Yet respondents devote pages 7 through 14 of a 28 page brief to answering this "frivolous" contention. This should answer the charge that our argument is frivolous. Under this section of respondents' brief (Br. 14), they argue that the death sentences here involved were finally confirmed long prior to January 31, 1951. They argue that the proceedings subsequent to April, 1949 have been by way of clemency proceedings. We question the accuracy of this statement. The legal situation involved in these reviews cannot be based upon pure "clemency".[5] United States Military Ordinance No. 7 gave to the United States Military Governor for Germany the right to review all judgments of the tribunals sitting at Nurnberg. The Military Governor was given authority to confirm or not confirm, to reduce the sentence or to grant clemency. Of course, it goes without saying that the political department of the United States acting through its Zone Commander could enlarge this right of review by executive action at any time. When the political cleavage came in Germany between the United States, Great Britain and France on one hand, and Russia on the other, for political reasons this country decided to change the form of its Military Government in Germany to a civilian government. Accordingly, the office of Military Government was abolished by the United States and governmental functions in Germany were transferred from the War Department to the State Department. The State Department appointed a High Commissioner for

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[5] If petitioners' reviews were *not* appeals the deficiencies of the procedures of the military courts functioning in Germany are *discriminatory* and hence void. *Dowd* v. *United States*, (decided January 2, 1951), 95 Lawyers' Ed. 183. And the Writ is the proper method of raising this question. *Dowd* v. *United States*, supra.

Germany, respondent McCloy, who has assumed the former functions of the Military Governor. When respondent McCloy became High Commissioner, he announced that the Nurnberg trials would be reviewed and he has in fact reviewed them. By executive action he set up a review board in Germany and undertook to review the decisions of the United States military tribunals at Nurnberg. He has reviewed these judgments not only from the point of view of clemency but from the point of view of accuracy. He has refused to follow some conclusions of fact and of law which his review has disclosed were not supported by the evidence. He modified numerous judgments, reduced sentences and freed many war criminals. He filed a written opinion on the merits, on January 31, 1951. We have quoted from that opinion in our Petition. In such circumstances we submit that it cannot now be argued that the sentences of death in the five Nurnberg cases *were final* prior to January 31, 1951. Respondent Handy likewise reviewed the Dachau cases. The opinions of McCloy and Handy of January 31 set the executions of the seven petitioners for February 14. We again assert that the speed of the courts below in taking the summary actions they did and in enforcing prerogatives based upon "war power" deprived petitioners of any pretense of a hearing and of due process of law. We suggest that the principles so aptly stated by Mr. Justice Jackson in his vigorous concurring opinion in *Woods* v. *Miller Co.*, 333 U. S. 138, 146, 147, are peculiarly applicable to our contentions. We quote (pp. 146, 147):

> "• • • but the arguments that have been addressed to us lead me to utter more explicit misgivings about war powers than the Court has done. The Government asserts no constitutional basis for this legislation (Title II of the Housing and Rent Act of 1947) other than this vague, undefined and undefinable 'war power'.

No one will question that this power is the most dangerous one to free government in the whole catalogue of powers. *It usually is invoked in haste and excitement when calm legislative consideration of constitutional limitation is difficult.* It is executed in *a time of patriotic fervor that makes moderation unpopular. And, worst of all, it is interpreted by judges under the influence of the same passions and pressures. Always, as in this case, the Government urges hasty decision to forestall some emergency or serve some purpose* and pleads that paralysis will result if its claims of power are denied *or their confirmation delayed.*

Particularly *when the power is invoked to do things to the liberties of the people,* or to their property or economy that indirectly affect the conduct of the war and do not relate to the management of the war itself, *the constitutional basis should be scrutinized with care.*

* * * I would not be willing to hold the war powers may be indefinitely prolonged, *merely by keeping legally alive a state of war that had in fact ended.* I cannot accept the argument that war powers last as long as the effects and consequences of war, for if so they are permanent—as permanent as the war debts." (Italics ours.)

We ask that these principles *be applied here.* What is done now in the hanging of Germans, is not done under the excuse of "patriotic fervor that makes moderation unpopular." It must be done deliberately. Peace exists between the United States and Germany and the minds of men should have been cleared of "war hates" and the effects of "war propaganda," and this case must now be dispassionately and calmly considered. There is no excuse for *haste and pressure.*

4(a). Respondents urge (Br. 16) that even if a state of war between the United States and Germany is ended, petitioners because they have been in the past enemy aliens

should be denied access to Federal courts. While respondents admit that the *Eisentrager* case did *not* determine whether a state of war between Germany and the United States had ended, they feel that the "rationale" of the majority opinion should deny aliens access to American courts even after peace is officially declared (Br. 16). This argument smacks of having been made because respondents realize that the state of war between the United States and Germany has ended. Respondents, therefore, urge that American areas in Germany, that is, those areas of Germany which the United States conquered and occupy even after peace has come and which are under exclusive American jurisdiction, such as the American prison at Landsberg, and the quarters of our diplomatic and consular representatives in Germany, are "foreign territory and beyond the confines of the territory of the United States." Respondents cite (Br. 17) the *Neely*,[6] *Spelar*,[7] *Curtiss-Wright Corporation*[8] and *Ross*[9] cases, to support their contention that the Constitution is not in force in foreign territory except with reference to United States citizens. As peace has come, these reserved areas under the Occupation Statute are United States territory in our view. They are in the same situation as American ships at sea which are considered "territory" of the United States,[10] and American Embassies and Consulates abroad.[11] The authority which representatives of the United States now have over territory reserved to the United States is that conferred upon them by the Constitution, treaties and laws of the United States. The questions involved concerning the status of

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[6] 180 U. S. 109.
[7] 338 U. S. 217.
[8] 299 U. S. 304.
[9] 140 U. S. 453.
[10] *In Re Ross*, 140 U. S. 453, 479; 48 C.J.S., International Law, Sec. 7, p. 11.
[11] 48 C.J.S., International Law, Sec. 7, p. 11.

American reservations in Germany under the Bonn Constitution, the Occupation Statute, as amended and as supplemented by executive political actions of the United States, are important and raise questions which should be decided by this Court in the national interests. Hence the cases cited are not in point, nor is *Ahrens* v. *Clark*, 335 U. S. 188. Certainly the *Eisentrager* case did not adopt the broad contentions asserted in the government's brief based on the *Ahrens* case, which are referred to in respondents' brief (Br. 17). The *Eisentrager* case is authority only for the proposition that enemy aliens during the period of hostilities do not have access to United States Courts. No other issue was presented or was necessary for a determination of the basic question there involved. Nor is the *Ahrens* case applicable here. In that case this Court specifically reserved the question of what process a person confined in an area not subject to the jurisdiction of any district court may employ to assert Federal rights. Mr. Justice Rutledge in his dissent pointed out that decision was reserved where the place of confinement is not within the territorial jurisdiction of any court. The *Ahrens* case held that a district court lacked power to issue a Writ of Habeas Corpus in a case where the person confined and the jailer were within another Federal jurisdiction.

4(b). Respondents next urge (Br. 18-20) that underlying the *Eisentrager* case are military operations, matters of inconvenience, a background of unfamiliar legal and political systems, the disruption caused by war, language difficulties and a hostile German population. From this respondents argue that all judicial proceedings conducted in Germany under the authority of the United States *"in relation to the American judicial system"* must be treated as *political questions*. We cannot adopt the contention that inconvenience, language difficulties and hostilities pose such great problems that only the political branch of the govern-

ment can properly solve them. On the contrary, we submit that this Court is competent and qualified to determine whether injuries caused or about to be caused to human beings are legal if carried out by the political department of the government, particularly against friendly Nationals under protecting provisions of existing international agreements with the United States. To accept the premise urged by respondents would be to destroy constitutional government. This contention would mean that the political department could perpetrate with absolute immunity any crime it desired abroad. Likewise it could violate with like immunity binding provisions of the United States Constitution, any treaty or treaties enacted thereunder or specific legislation controlling such political actions. That would be tyranny. Certainly it was never intended under the Constitution of the United States that the political department of the government would not be required to function under that Constitution. The argument of respondents loses sight of the basic fact that personal and property rights arising under international agreements existing between the United States and other nations come within the protection of the judicial power of the United States. Geography has never yet been the determining factor when the construction of a treaty of the United States is invoked by interested parties. Nor can the provisions of a treaty executed between the United States and Germany be violated by the Executive Department for "security" reasons. We respectfully request that this Court reject such a contention and call the attention of the respondents to the fact that they have taken solemn oaths to support and defend the Constitution of the United States and all treaties and laws enacted thereunder and that they cannot with impunity violate their oaths of office.

5. Respondents next argue (Br. 20-22) that the petitions below do not present any issue which could be determined

by this Court. This argument reduces itself to the proposition that no matter how illegally an American military commission or tribunal may act, this Court lacks power to take any corrective judicial action. That cannot be the law, when measured by the *sum total* of the charges here involved against the trying commissions and responsible authorities. We summarize them briefly:

(1) The commissions and tribunals involved were illegally constituted.

(2) They violated basic rules of military law adopted by Congress controlling war crimes trials.

(3) They abolished all rules of evidence.

(4) They freely received hearsay evidence.

(5) They *isolated* and *confined* petitioners and their witnesses, and during solitary confinement denied them *any* counsel.

(6) They seized and blocked all assets and property of petitioners, thus depriving them of funds for the defense of their lives.

(7) They deprived five of the petitioners of American counsel.

(8) They interrogated petitioners and their witnesses while isolated and confined, and then used such interrogations as evidence against petitioners.

(9) They charged petitioners with violations of the Geneva Convention but denied petitioners the protections of that Convention.

(10) Military ordinances issued gratuitously and unilaterally by the victors made acts *legal when done by express provisions even of the applicable laws of the victors,* illegal and punishable by death.

(11) Prosecutors freely used a *controlled* press and moving pictures to prejudge petitioners and deprive them of a fair trial.

(12) By a "directive," no information which would tend to absolve a war criminal of guilt would be given. Yet statements as to prejudicial conditions in concentration camps and concerning "atrocities" were freely given out for publication and used as "evidence" against petitioners.

(13) The protective provisions of the Geneva Convention were openly violated.

(14) The trying tribunals considered themselves not American military commissions which they were, but "World" tribunals not representing their government, but a "World Society" and hence free to write new rules of International Law of first impression, and competent to order the execution of petitioners for *general* violations of such *new* law.

(15) It was deemed unnecessary for an accused charged with capital crimes to even *be present* or *to testify* in his own defense.

(16) Newly discovered evidence gathered after trial completely destroying every "fact" upon which *guilt* was based, was disregarded and ignored.

(17) When plain error occurred and it was discovered on review that the tribunal refused to follow its own ruling excluding material from consideration, no new trial was afforded.

(18) Guilt by association was considered a sufficient basis upon which to predicate a death sentence.

(19) Petitioners were deprived of *any* defense of binding superior orders issued in time of war.

(20) Petitioners were deprived of their "right to make a defense."

(21) Every safeguard established by the Constitution and the common law to afford an accused a fair and impartial trial was either decreed not applicable by "directives" or abolished by pretrial and trial practices in Germany.

(22) They insist upon carrying out death sentences *in Germany* after the abolition by the German Constitution of *all* death penalties.

Yet, in face of these *admitted* facts, respondents say *this Court is powerless to act* on the theory that the review of military trials is too limited to enable this Court to do anything about such executive actions. We state the contrary. This Court must have power and has jurisdiction to afford appropriate relief.

We do not read the cases of *Hiatt* v. *Brown*, 339 U. S. 103; *In re Yamashita*, 327 U. S. 1; *Ex parte Quirin*, 317 U. S. 1; or *Hirota* v. *MacArthur*, 338 U. S. 197, to mean what respondents assert (Br. 21, 22). Those cases hold "that *Congress* (not the Executive) by sanctioning trials of enemy aliens by Military Commission for offenses against the law of war had recognized the right of the accused *to make a defense*" (327 U. S. 9). They hold "the Executive Branch could not withdraw • • • from the courts the duty and power to make such inquiry into the authority of the Commission as may be made by habeas corpus" (327 U. S. 9). Those cases hold military commissions' authority, their constitution and their jurisdiction can be reviewed by the Writ. Further, the questions of whether the commission had jurisdiction over the persons accused and whether it had jurisdiction over the offenses charged and whether it imposed a sentence within its powers may be reviewed by the Writ. We submit that respondents concede this in their Brief (Br. 21).

The jurisdictional errors we urge are not mere "errors of procedure" of the type mentioned in the *Yamashita* case (327 U. S. 8, 9). Our errors go to the jurisdiction of the tribunals, their powers and their *loss of jurisdiction* over both the accused and the sentences sought to be imposed. Can anyone review our charges and say that the tribunals

and commissions below had jurisdiction from the indictments to the final convictions and have not lost what jurisdiction, if any, they may have had? We think not.

Respondents concede (Br. 22) that the 1949 Prisoner of War Convention changes the rule of the *Yamashita* and *Eisentrager* cases but argue as Congress has not yet approved this treaty prepared by the Executive Department of the United States, its provisions in no way control here. We called the provisions of the 1949 Convention to the attention of this Court to show that the political department of the United States now has determined that the rule of the *Yamashita* and *Eisentrager* cases is wholly impracticable, is not in accordance with International Law and affords no protection to prisoners of war. Therefore, that department has taken steps to establish by treaty that prisoners of war are entitled to the protections of the Prisoner of War Convention for "pre-capture offenses." We contend that the Convention of Geneva, 1949, does not produce a new interpretation of Military Law but is to be considered as a mere codification of an established norm of International Law. This is the view of the new Federal Republic of Germany.

Respondents' contentions in footnote 10 (Br. 22) that no other challenges of jurisdiction than those described therein are made against the tribunals and commissions here involved are erroneous assertions of our position, as a reading of our Petition and this Reply Brief will show.

Respondents assert (Br. 23) that the Constitution of the Federal Republic of Germany, which abolishes the death sentence, should not be applied for two reasons—first, respondents say United States authorities are not bound by German law, and, secondly, the Occupation Statute reserving control over sentences continues death sentences in Germany insofar as the power of American officials is

concerned. Neither contention is sound. A new government has been created for Western Germany. Its provisions apply to all Germans, including petitioners. It renders inviolate human life. It abolishes without exception capital punishment throughout the new Republic. A statutory reservation of control is not sufficient to continue in force the death sentence in Germany against petitioners. The principle involved is one of constitutional construction. This Court has had similar situations before it in construing constitutional enactments in these United States. Thus, on the repeal of the Eighteenth Amendment, Mr. Chief Justice Hughes, speaking for a unanimous Court, in *United States* v. *Chambers*, 291 U. S. 217, 222, held that upon ratification the constitutional amendment became operative and the Eighteenth Amendment became inoperative. As this Court ruled, the prior authority immediately fell in view of the new constitutional provision. This Court held (p. 223):

> "This consequence is not altered by the fact that the crimes in question were alleged to have been committed while the National Prohibition Act was in effect. The continued prosecution necessarily depended upon the continued life of the statute, which the prosecution seeks to apply. * * * no further proceedings can be had to enforce it in pending prosecutions * * *."

As we read the *Chambers* case, this Court has decided that in order to give effect to respondents' contentions the constitution when enacted must in itself contain the necessary saving provisions. Thus this Court held (p. 223):

> The decisions of this Court afford abundant illustration of this principle. In *Yeaton* v. *United States*, 5 Cranch 281, 283, where the statute under which a ship had been condemned in admiralty had expired while the case was pending on appeal, the Court held that the cause was to be considered as if no sentence had been

pronounced. Chief Justice Marshall said that "it has long been settled, on general principles, that after the expiration or repeal of a law, no penalty can be enforced, nor punishment inflicted, for violations of the law committed while it was in force, unless some special provision be made for that purpose by statute." Chief Justice Taney observed in *Maryland* v. *Baltimore & Ohio R. Co.*, 3 How. 534, 552: "The repeal of the law imposing the penalty, is of itself a remission." In *United States* v. *Tynen*, 11 Wall. 88, 95, the Court thus stated the principle applicable to criminal proceedings: "There can be no legal conviction, nor any valid judgment pronounced upon conviction, unless the law creating the offence be at the time in existence. By the repeal the legislative will is expressed that no further proceedings be had under the Act repealed." See, also, *Norris* v. *Crocker*, 13 How. 429, 440; *Gulf, C. & S. F. Ry. Co.* v. *Dennis*, 224 U. S. 503, 506.

The abortive and indecisive language of the Occupation Statute cannot have the effect of continuing the right of capital punishment in officers of the United States in Germany. A mere reservation in that statute of "control" in the carrying out of sentences is inadequate even if it applies to American prisons in Germany, which we deny, to prevent a remission. A similar argument was made to the Court in the *Chambers* case. There it was contended that the saving provisions of general legislation were sufficient to support prosecutions and the carrying through of pending appeals to final judgments. This Court rejected that argument because statutory enactments cannot be used to qualify absolute constitutional provisions. This Court held (p. 224) that the statute must give way to the provisions of the constitution. The German Constitution which America has agreed to, precludes "further enforcement" of the appealed sentences here involved. As this Court said, if it was desired to have a saving clause apply to constitutional provisions, the enacting authorities should have had a saving clause included as a part of the constitution. If

such authorities elect not to do so, then the statutory provision cannot operate contrary to the express provisions of the constitution.

It is our contention that the death sentences here did not become "final judgments" until January 31, 1951. They have the same status as appeals of judgments of convictions pending in the United States Courts at the time the Twenty-First Amendment to the Constitution was adopted. We cannot accept respondents' contentions that there was finality to the original sentences. Under such circumstances, as this Court specifically held in the *Chambers* case (p. 226), the law was deprived of force because of a withdrawal of prior authority. As we read that ruling, if a constitutional amendment had been enacted in the United States abolishing capital punishment, and no saving provision was included in the amendment to carry out all death sentences including those pending on appeal, the authority to carry out such sentences would have been withdrawn and they could no longer be carried out by *executions*. As this Court said in the *Chambers* case (p. 226):

> What we have said is applicable to prosecutions, *including proceedings on appeal,* continued or begun after the ratification of the Twenty-first Amendment. (Italics ours.)

That respondents considered the proceedings *not final* and open for the filing of Petitions for Writs of Habeas Corpus within two weeks from January 31, 1951 is established by the written instructions which they gave through respondent Graham, to petitioners reading as follows:

> Referring to cable message of January 29, 1951 DPT cable 5213 Heidelberg 196 it is requested to inform the Dachau and Nurnberg prisoners about their execution and to instruct them in the same time as follows:
>
> 1) Execution will not be stayed if this will not be ordered by a competent court in the United States within a period of 2 weeks.

2) The prisoners have to send all petitions by air mail directly to the court, the filing fee included.

3) Arrangements for payment of the filing fee in dollar currency are to be made with the Director Wilhelm of the Bank Deutscher Länder at Frankfurt/M. (Bank of German countries) Tel. 30541 (call 215 and 216).

4) The filing of petition will be refused by the court if the filing fee is not paid.

Respondents assert (Br. 24-27) they had the right to try petitioners for offenses committed in their military service and to deprive petitioners of the defense of superior orders. They argue they had the right to do this by ex post facto enactments in order to hold defeated Germans responsible for the vast destruction of life occurring in World War II. This is the legal basis they assert for their changing in 1945 of the established rules of International Law on this subject. We question the legality of unilateral action of the victorious powers directed against defeated enemy soldiers. In times past for an international principle to bind a sovereign nation, that nation had to agree to the adoption of such a principle.[12] *This is the very basis for the argument asserted by respondents to avoid the effect of the 1949 Convention.*

Let us consider whether military orders issued to soldiers

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[12] *In Re Ross*, 140 U. S. 453, cited by respondents. In the *Ross* case this Court held (p. 464):

"When, therefore, the representatives or officers of our Government are permitted to exercise authority of any kind in another country, it must be on such conditions as the two countries may agree, the laws of neither one being obligatory upon the other."

Why is not the principle announced by this Court in *Coleman* v. *Tennessee*, 97 U. S. 509, 516 applicable here? In the *Coleman* case this Court held (p. 516, 517):

". . . The fact that war is waged between two countries negatives the possibility of jurisdiction being exercised by the tribunals of one country over persons engaged in the military service of the other for offences committed while in such service. Aside from want

in time of war in defense of their homeland are "something which every human must recognize as evil" as asserted by respondents (Br. 26). Respondents have asserted that definitions of crime announced by the Executive Department should be treated as "political actions". We deny this, but let us measure these actions by utterances of political experts of the Allies. We must understand that total modern war is not a game. Nor can a soldier have standing by his side in time of war his lawyer to advise him as to whether or not he can legally carry out orders issued by his superiors. To give to soldiers the right to disobey orders on the theory that such orders are illegal, of course would destroy any military institution and turn it into an ineffective debating society.

As General Sherman said, "War is Hell." Unconditional obedience in war is required by military men.[13] As General Montgomery announced on October 28, 1946, at Glasgow:

> Men must learn to obey orders in spite of all their instincts crying out not to. I am a soldier and I always obey orders.

Mr. Paget, British defense counsel at Mannstein, in discussing the problem of superior orders, in the shelling of the friendly French fleet announced:

> Is there any doubt whatever that Admiral Sommerville was right? He implicitly obeyed orders. Neither was there any question of obeying half-heartedly. He did his very best in executing orders. Has any

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of jurisdiction, there would be something incongruous and absurd in permitting an officer or soldier of an invading army to be tried by his enemy, whose country he had invaded."

• • •

. . . they (invading soldiers) were not subject to the laws nor amenable to the tribunals of the hostile country."

[13] Witness President Truman's "firing" of General MacArthur for alleged failure to obey "unconditionally" and "wholeheartedly" military directives!

> one of us the slightest doubt of his being right? Would anybody hesitate to discharge him for neglecting his duty as an Englishman and an Admiral, had he done otherwise, even had he obeyed orders but half-heartedly? Obedience means executing the Chief-Commander's orders with a whole heart. It was his duty to obey and he obeyed. Had we been vanquished and had our victor attempted to punish him, would any one of you doubt this to be a serious abuse of authority? . . . Does any one of you foster the slightest doubt of Winston Churchill's being right in giving this order? It was however in flagrant opposition to international law. It meant murdering 1500 Frenchmen. But all the same I believe there to be very few who doubt it to have been exactly the right order. Our country's safety was at stake.

Admiral Blandy, Commander of the United States Atlantic Fleet, in October, 1949, in discussing the use of atomic bombs, said:

> No sane man would want to drop a bomb on women and children. I'm thankful I've never had to take the lives of women and children in war, but if some superior thought it was necessary for the security of the country, I'd do it.

Secretary Matthews, United States Secretary of the Navy, on January 23, 1950, in removing Admiral Denfeld, justified this removal to Congress as follows (Congressional Record, Jan. 23, 1950, No. 15, p. 773):

> A military establishment is not a political democracy. Integrity of command is indispensable at all times. There can be no twilight-zone in the measure of loyalty to superiors and respect for authority existing between various ranks. Inability to conform to such requirements of military stability would disqualify any one of us for positions subordinate to the Commander-in-Chief.

When the actions of petitioners are measured by such principles, bearing in mind that four of petitioners were fighting a desperate and no quarter war in Russia, how can death sentences lawfully be predicated on the carrying out of military orders? Four of the petitioners are condemned to death for alleged crimes committed in Russia against Communists. *Yet in 1947 the death penalty pertaining to such offenses was abolished by Russia and in the Eastern Zone of Germany.* Yet respondents insist on carrying out the hangings of petitioners here. This enigma we cannot understand, when the death sentences for the alleged massacring of American troops by Germans have been commuted by respondents to sentences of less than death.

Conclusion

One of the announced purposes of the occupation of Germany was to bring principles of democracy to that country and to reestablish a democratic form of government there. If the United States is to succeed in its aim of establishing a permanent new German Government as its ally, the one principle which must be established is German respect for the American traditions of good government and the fair and impartial dispensing of justice. The proceedings below were such a departure from American and Western European traditional methods of judicial process that Western Germany has been shocked thereby. In the interests of an honest reconciliation, Certiorari should be granted and American traditions of judicial process reestablished by this Court.

Respectfully submitted,

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APRIL 19, 1951.